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In the Supreme Court of the United States

STATE OF KANSAS, PLAINTIFF

v.

STATE OF COLORADO

ON EXCEPTIONS TO THE THIRD REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE EXCEPTIONS OF KANSAS AND COLORADO

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether a money damages remedy based, in part, on the aggregate losses incurred by past, present, and future Kansas water users due to Colorado's depletion of stateline flows of the Arkansas River violates the Eleventh Amendment. (Colorado Exception No. 1).

2. Whether the Special Master erred in recommending that a money damages remedy include prejudgment interest beginning in 1969. (Colorado Exceptions Nos. 2 & 3; Kansas Exception).

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STATEMENT

The State of Kansas brought this original action against the State of Colorado to resolve disputes under the Arkansas River Compact (Compact), Act of May 31, 1949, ch. 155, 63 Stat. 145. This Court granted Kansas leave to file its complaint, *Kansas* v. *Colorado*, 475 U.S. 1079 (1986), and the Court appointed the Honorable Wade H. McCree, Jr., to serve as the Special Master. 478 U.S. 1018 (1986). Upon Judge McCree's death, the Court appointed Arthur L. Littleworth as the Special Master, 484 U.S. 910 (1987). Special Master Littleworth granted the United States' unopposed motion for leave to intervene in the action, conducted a trial limited to questions of liability, and submitted a report, which recommended that the Court find Colorado had violated the Compact in certain respects. 513 U.S. 803

(1994). This Court overruled the exceptions of both Kansas and Colorado to the Master's First Report. 514 U.S. 673 (1995).

The Master subsequently submitted a Second Report that addressed preliminary issues respecting a remedy, and the Court invited the parties to file exceptions. 522 U.S. 803 (1997). Colorado filed two exceptions, which were overruled without prejudice to Colorado's right to renew those exceptions at the conclusion of the remedy phase of the case. 522 U.S. 1073 (1998).

After further proceedings, including a trial on the appropriate remedy for Colorado's violations of the Compact, the Master issued a Third Report, dated August 2000, containing his recommended remedy for Colorado's violations of the Compact. 121 S. Ct. 294. Both Kansas and Colorado have filed exceptions to the recommended remedy. The United States files this brief to provide the Court with the federal government's perspective on the parties' exceptions to the Master's Third Report.

1. The Arkansas River Basin

The Arkansas River originates on the east slope of the Rocky Mountains in central Colorado and flows south and then east across Colorado and into Kansas. It receives significant in-flows from the Purgatoire River, its major tributary in Colorado, which originates in the Sangre de Cristo mountains in southern Colorado near the New Mexico border. The Purgatoire River flows in a notheasterly direction to join the Arkansas River about 60 miles west of the Kansas border, at Las Animas, Colorado. See *Kansas* v. *Colorado*, 514 U.S. 673, 675-676 (1995).

The United States has constructed three water storage projects on this river system. The John Martin Reservoir, located immediately east of the juncture of the Purgatoire and Arkansas Rivers in Colorado, is operated by the Army Corps of Engineers to control floods and to provide storage water in accordance with the Arkansas River Compact. It has a storage capacity of approximately 700,000 acre-feet. 514 U.S. at 677. The Pueblo Reservoir, located on the Arkansas River about 150 miles upstream of the Kansas border near Pueblo, Colorado, is managed by the Department of the Interior's Bureau of Reclamation as part of the Fryingpan-Arkansas Project. It has a storage capacity of approximately 357,000 acre-feet. *Ibid.* The Trinidad Reservoir, located on the Purgatoire River near Trinidad, Colorado, is jointly managed by the Army Corps of Engineers and the Bureau of Reclamation to control floods and to provide storage water for use by the Bureau of Reclamation's Trinidad Project. It has a storage capacity of approximately 114,000 acre-feet. *Ibid.*

Twenty-three canal systems in Colorado divert water from the Arkansas River for irrigation. Fourteen of those systems are located upstream from John Martin Reservoir, and four of those systems have associated privately-owned, off-channel water storage facilities. Six canal systems in Kansas operate between the Colorado border and Garden City. See 514 U.S. at 677.

2. The Arkansas River Compact

The Arkansas River Compact apportions the Arkansas River between the States of Kansas and Colorado. The Compact was an outgrowth of two original actions that the States had filed in this Court disputing their

respective entitlements to use of the Arkansas River. See 514 U.S. at 678. In each of those cases, the Court denied Kansas's request for an equitable apportionment. See *Kansas* v. *Colorado*, 206 U.S. 46, 114-117 (1907); *Colorado* v. *Kansas*, 320 U.S. 383, 391-392 (1943).

In the first suit, Kansas sought to enjoin water diversions in Colorado, but the Court denied relief on the ground that Colorado's depletions of the Arkansas River were insufficient at that time to warrant injunctive relief. *Kansas* v. *Colorado*, 206 U.S. at 114-117. In the second suit, Colorado sought to enjoin lower court litigation brought by Kansas water users against Colorado water users, while Kansas sought an equitable apportionment of the Arkansas River. The Court concluded that Colorado was entitled to the injunction it sought, but the Court concluded once again that Kansas had failed to show sufficient injury to warrant an equitable apportionment of the Arkansas River. *Colorado* v. *Kansas*, 320 U.S. at 391-392; see *Kansas* v. *Colorado*, 514 U.S. at 678.

In denying Kansas's second request for judicial relief, the Court suggested that a dispute such as the one between Kansas and Colorado calls for "expert administration rather than judicial imposition of a hard and fast rule," and that the controversy "may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the federal Constitution." *Colorado* v. *Kansas*, 320 U.S. at 392. Shortly thereafter, the States approved, and Congress ratified, the Arkansas River Compact, Act of May 31, 1949, ch. 155, 63 Stat. 145. The Compact was intended to "[s]ettle existing disputes and remove causes of future controversy" between the States and their citizens over

the use of the Arkansas River. To that end, the Compact was designed to

> [e]quitably divide and apportion between the States of Colorado and Kansas the waters of the Arkansas River and their utilization as well as the benefits arising from the construction, operation and maintenance by the United States of John Martin Reservoir Project for water conservation purposes.

Compact Art. I, 63 Stat. 145. The Compact accomplishes those goals through two basic mechanisms.

First, the Compact protects the States' respective rights to continued use of the Arkansas River through a limitation on new depletions. Article IV-D of the Compact allows new development in the form of dams, reservoirs, and other water-utilization works in Colorado and Kansas, provided that the "waters of the Arkansas River" are not thereby "materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact." 63 Stat. 147. The Compact defines the term "waters of the Arkansas River," Art. III-B, 63 Stat. 146, but it does not expressly define what constitutes a "material" depletion or a "usable" quantity.[1]

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[1] The full text of Article IV-D states as follows:

> This Compact is not intended to impede or prevent future beneficial development of the Arkansas River basin in Colorado and Kansas by Federal or State agencies, by private enterprise, or by combinations thereof, which may involve construction of dams, reservoir, and other works for the purposes of water utilization and control, as well as the improved or prolonged functioning of existing works: Provided, that the waters of the Arkansas River, as defined in Article III, shall not be materially depleted in usable quantity or availability

Second, the Compact regulates the storage of water at John Martin Reservoir and specifies the criteria under which each State is entitled to call for water releases. Article V of the Compact, which provides the "basis of apportionment of the waters of the Arkansas River," prescribes the timing of storage at the reservoir and the release criteria. 63 Stat. 147-149. Basically, between November 1 and March 31, in-flows to the John Martin Reservoir are stored, subject to Colorado's right to demand a limited amount of water. Between April 1 and October 31, the storage of water is largely curtailed, and either State may call for releases at any time in accordance with the flow rates set out in the Compact. *Ibid.*

The Compact creates an interstate agency, the Arkansas River Compact Administration, to administer the Compact. Art. VIII, 63 Stat. 149-151. The Compact Administration consists of a non-voting presiding officer designated by the President of the United States and three voting representatives from each State. It is empowered to adopt by-laws, rules, and regulations, prescribe procedures for the administration of the Compact, and perform functions to implement the Compact. See Arts. VIII-B, VIII-C, 63 Stat. 149, 150. Article VIII-H of the Compact directs that the Administration shall "promptly investigate[]" violations of the Compact and report its findings and recommendations to the appropriate state official. 63 Stat. 151. That Article further states that it is "the intent of this Compact that enforcement of its terms shall be accomplished in

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for use to the water users in Colorado and Kansas under this Compact by such future development or construction.

63 Stat. 147.

general through the State agencies and officials charged with the administration of water rights." *Ibid.*

3. The Current Proceedings

Kansas brought this action in 1985 to enforce the provisions of the Arkansas River Compact. Special Master Littleworth filed his initial report with the Court in July 1994 addressing issues of liability. He recommended that the Court find that post-Compact well pumping in Colorado had violated Article IV-D of the Compact and that Colorado be held liable for that violation. The Master also recommended that the Court find no violation of the Compact with respect to Kansas's claims arising from the operation of the Trinidad Reservoir and the Winter Water Storage Program that utilizes excess storage capacity at the Pueblo Reservoir. The Court adopted all of the Master's recommendations and remanded for determination of the unresolved issues—primarily relating to what remedy, if any, Kansas was entitled to as a result of Colorado's breach—in a manner not inconsistent with the Court's opinion. *Kansas* v. *Colorado*, 514 U.S. at 694.

On remand, the Master conducted further proceedings and issued a Second Report providing his preliminary recommendations on the issues of: (a) quantifying the depletions in flows of the Arkansas River at the Colorado-Kansas border (stateline flows) for the period 1950-1985; (b) quantifying depletions for the period subsequent to 1985; (c) bringing Colorado into current compliance with the provision of the Compact; and (d) a remedy for past depletions. See Second Report 2, 112. The Court invited the parties to file exceptions to the recommendations contained in the Master's Second Report. See 522 U.S. 803 (1997). Kansas and the United

States did not file any exceptions. Colorado challenged the Master's conclusions that (1) if the remedy includes money damages, the Eleventh Amendment of the United States Constitution does not bar an award of money damages based, in part, on losses incurred by Kansas's water users; and 2) the unliquidated nature of Kansas's claim for damages does not, in and of itself, bar the award of prejudgment interest. The Court overruled Colorado's exceptions without prejudice to Colorado's right to renew those exceptions at the conclusion of the remedy phase of the case. 522 U.S. 1073 (1998).

After conducting further proceedings, including a trial on the appropriate remedy for Colorado's violations of the Compact, the Master issued his Third Report, dated August 2000, containing his recommended remedy. The Master's Third Report recommends, in essence, that:

> (1) depletions of usable stateline flow for the 1995-1996 period be determined to be 7935 acre-feet, bringing the total depletions for 1950-1996 to 428,005 acre-feet;
>
> (2) the Court confirm the Master's determination that if a suitable remedy includes money damages, those damages should be based upon Kansas's loss rather than upon any gain to Colorado;
>
> (3) the Court confirm the Master's conclusion that if a remedy includes money damages, the Eleventh Amendment does not preclude damages awarded to Kansas from being based, in part, upon losses incurred by its water users;

(4) the Court confirm the Master's ruling that the unliquidated nature of Kansas's claim for damages does not bar the award of prejudgment interest;

(5) the remedy be money damages, rather than repayment of the historical shortage by additional water deliveries in the future;

(6) the amount of Kansas's damages be determined on the basis of the analyses used by Kansas's experts;

(7) the categories of Kansas's damages be calculated as provided in the Third Report;

(8) Kansas's damages include prejudgment interest as provided in Section XI of the Third Report;

(9) the Master's March 22, 2000, order regarding mitigation of damages be confirmed; and

(10) the Master's May 1, 2000, order regarding Colorado's objection to expert testimony on secondary economic damages be confirmed.

Third Report 119-120.

As relevant here, the core of the Master's recommendation is that money damages be awarded to Kansas for water losses beginning in 1950, with prejudgment interest awarded for the period from 1969 to the present. Kansas has filed an exception to the Master's determination that prejudgment interest should be awarded only from 1969 forward. Colorado has filed a number of exceptions, including a renewal of its exceptions to include the losses of Kansas's water users in the calculation of damages, and to any award of prejudgment interest.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Kansas brought this action to enforce its rights under the Arkansas River Compact, which apportions the flow of the Arkansas River between Kansas and Colorado. This Court resolved the issues of liability in its earlier decision in *Kansas* v. *Colorado*, 514 U.S. 673 (1995), which accepted the Master's recommendation that Colorado be held liable for violations of Article IV-D of the Compact resulting from post-Compact well pumping in Colorado. On remand, the Master heard evidence and prepared a thorough report addressing a number of issues, including what potential remedies might be available for Colorado's breach. The Court overruled Colorado's exceptions to that report without prejudice and remanded the case to the Master for further proceedings. 522 U.S. 1073 (1998). Following resolution of a number of other issues related to Compact compliance and modeling, the Master conducted a trial on the appropriate remedy for Colorado's past violations of the Compact. Following that trial, the Master submitted his Third Report documenting his ultimate recommendations with respect to the appropriate remedy for Colorado's violations of the Compact.

The Master recommended that Kansas be awarded money damages for all losses that have occurred as a result of Compact violations, including the aggregate losses to past and future Kansas water users, and that prejudgment interest be awarded on damages from 1969 to the present. The Master's proposed remedy raises two questions of first impression in this Court: (1) how to calculate an award of money damages against a State as a remedy for a violation of a compact apportioning the waters of an interstate river; and (2)

the availability of prejudgment interest on such an award. The United States submits that, under the circumstances of this case, the Master's recommended remedy falls within the Court's broad discretion to fashion a fair and equitable remedy for Colorado's violation of the Arkansas River Compact.

I. Colorado contends that the Eleventh Amendment bars an award of money damages that is calculated, in part, based on injuries to individual water users in Kansas that resulted from groundwater pumping in Colorado. Under this Court's cases, however, the Eleventh Amendment bars a suit by a State only if it is appearing as a nominal party for purposes of advancing the private claims of individual citizens of the State against another State. Here, Kansas sued to protect its sovereign interests as a party to an interstate compact and its quasi-sovereign interests in the health and economic well-being of its citizens. This Court held in *Texas* v. *New Mexico*, 482 U.S. 124, 130-132 & n.7 (1987), that an award of money damages can be an appropriate remedy in such a case and is not barred by the Eleventh Amendment. Nothing in the Eleventh Amendment bars the Court from calculating the amount of those damages by reference to the injuries sustained by the individual water users who comprise the general population that Kansas has a legitimate quasi-sovereign interest in protecting.

II. The Master recommends that prejudgment interest be awarded for the period from 1968 to the present. Colorado objects to that award, urging the Court to adopt a categorical rule barring an award of prejudgment interest for violation of an interstate compact apportioning the flows of an interstate river. Colorado relies on the traditional rule at common law that prejudgment interest is not owed where damages

are unliquidated. In cases within its original jurisdiction, however, the Court has broad discretion to fashion appropriate principles of decision, and it has not been bound by statutory or common law rules that may be applicable in other settings. Here, the Master identified sound reasons for not adopting the categorical rule that Colorado proposes. In the first place, the common rule was never absolute, and it is no longer followed in a number of jurisdictions. Moreover, this Court has repeatedly observed that the distinction between liquidated and unliquidated damages for these purposes is inconsistent with the goal of affording adequate compensation, and that a strict rule barring prejudgment interest where damages are unliquidated has been subject to substantial criticism for that reason. We therefore support the Master's recommendation that the common law rule generally barring an award of prejudgment interest on unliquidated damages not be imported into the jurisprudence of suits between States within this Court's original jurisdiction.

After rejecting a categorical rule barring the award of prejudgment interest, the Master carefully evaluated all of the circumstances of the case and the respective equities of the two States that bear on the appropriateness of an award of prejudgment interest, and concluded that such an award is proper but only from 1968 forward. Kansas has filed an objection, contending that prejudgment interest should be awarded all the way back to 1950. Colorado, on the other hand, contends that if prejudgment interest is not altogether foreclosed, it should be awarded only beginning in 1985, when Kansas first filed a formal complaint concerning the groundwater pumping. In our view, however, the Master reasonably balanced the relevant factors in awarding prejudgment interest beginning in 1969,

when, the Master found, Colorado first knew or should have known that groundwater pumping in that State was depleting stateline flows of the Arkansas River.

ARGUMENT

I. THE CALCULATION OF DAMAGES FOR INJURIES TO KANSAS'S QUASI-SOVEREIGN INTEREST IN THE ECONOMIC HEALTH AND WELFARE OF ITS RESIDENTS IN PART ON THE BASIS OF INJURIES SUFFERED BY PAST, PRESENT, AND FUTURE KANSAS WATER USERS DOES NOT VIOLATE THE ELEVENTH AMENDMENT

The Court has previously held, in *Texas* v. *New Mexico*, 482 U.S. 124, 130-132 (1987), that money damages may be awarded against a State as a remedy for its violation of an interstate compact that apportions the flow of a river between two States, and it subsequently entered a stipulated judgment in that case ordering New Mexico to pay $14 million to Texas. See 494 U.S. 111 (1990). See also *Virginia* v. *West Virginia*, 246 U.S. 565 (1918) (enforcement of judgment for money damages for violation of interstate compact to assume debt); *South Dakota* v. *North Carolina*, 192 U.S. 286 (1904) (suit to recover on bonds); *United States* v. *Michigan*, 190 U.S. 379 (1903) (suit to require Michigan to account for surplus moneys from sale of land to fund construction of canal).

Because the parties reached a settlement regarding the amount of damages to be paid in *Texas* v. *New Mexico*, this case presents the first occasion for the Court to determine the appropriate amount of a monetary remedy for a violation of an interstate compact apportioning the flow of an interstate stream. The

Master, in a thorough report detailing his analysis of the applicable law and exploring the potential remedies Kansas may obtain as a result of Colorado's breach of the Compact, recommended a monetary award based, in part, on evidence of the injuries to Kansas's water users as a result of Colorado's breach. Colorado contends that the Eleventh Amendment bars a State, acting in its *parens patriae* capacity, from recovering money damages based on losses to individual water users that occurred as a result of a violation of an interstate compact. See Colo. Excp. Br. 10-25. We disagree.

The Eleventh Amendment provides, in relevant part, that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." U.S. Const. Amend. XI. The Eleventh Amendment prevents a State from suing another State where it is essentially a nominal party and appears as a "trustee" seeking to enforce only the personal rights or claims of individual citizens who could not themselves sue the defendant State. See *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883); *North Dakota* v. *Minnesota*, 263 U.S. 365 (1923). The Eleventh Amendment does not, however, bar a suit brought by a State acting as *parens patriae* to its citizens "to prevent or repair harm to its 'quasi-sovereign' interests." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 258 (1972). As the Court stated in *North Dakota*:

> The right of a State as *parens patriae* to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another State, by prayer for

> injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister State.

263 U.S. at 375-376; see also *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981) ("[A]n original action between two States only violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to specific individuals."); *Hawaii* v. *Standard Oil Co.*, 405 U.S. at 259 n.12 ("An action brought by one State against another violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to designated individuals.").

The *New Hampshire* and *North Dakota* decisions illustrate the circumstances in which a suit by a State is barred by the Eleventh Amendment because the State appears only as a nominal party in presenting personal claims of its citizens, and not as *parens patriae* seeking to protect the general interests of the State and its inhabitants. In *New Hampshire*, citizens of New Hampshire and New York held bonds issued by the State of Louisiana, payment of which was in default. The individual holders assigned the bonds to their respective States, which brought an original action in this Court to recover the amount due on the bonds. The Court concluded that the States' action was barred by the Eleventh Amendment because it was a mere subterfuge for recovery on behalf of the individual bondholders. The States, according to the Court, were "nothing more nor less than * * * mere collecting agent[s] of the owners of the bonds and coupons, and while the suits are in the names of the States, they are under the actual control of individual citizens, and are

prosecuted and carried on altogether by and for them." *New Hampshire*, 108 U.S. at 89.[2]

In *North Dakota*, the Court ruled that the Eleventh Amendment barred North Dakota from bringing a damages claim against Minnesota seeking $1 million "for its inhabitants whose farms were injured and whose crops were lost" as a result of flooding allegedly caused by Minnesota's use of the Mustinka River. 263 U.S. at 374. The Court observed:

> The evidence discloses that nearly all the Dakota farm owners whose crops, lands and property were injured in these floods, contributed to a fund which has been used to aid the preparation and prosecution of this cause. It further appears that each contributor expects to share in the benefit of the decree for damages here sought, in proportion to the amount of his loss. Indeed it is inconceivable that North Dakota is prosecuting this damage feature of its suit without intending to pay over what it thus recovers to those entitled.

Id. at 375. Relying on its decision in *New Hampshire* v. *Louisiana*, the Court ruled that North Dakota was

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[2] Among other things, the individual owners were required to fund all costs and expenses of the litigation, and state law required that all moneys collected be kept by the State's attorney general, as special trustee, in a separate account. Those moneys were to be paid over to the owners of the bonds after the litigation costs were deducted. *New Hampshire*, 108 U.S. at 89. In the case of New Hampshire, the individual bondholders also had the right to choose their own counsel to pursue the claims, and their consent was required before the claims could be settled. *Ibid.* Based on those facts, the Court declared that "[n]o one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced, and are now prosecuted, solely by the owners of the bonds and coupons." *Ibid.*

acting, not as *parens patriae*, but as a trustee, seeking to present and enforce private claims of its individual citizens. *Ibid.* See also *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 600 (1982) ("if the State is only a nominal party without a real interest of its own—then it will not have standing under the *parens patriae* doctrine").[3]

The rule that emerges from this Court's cases, then, is that while a State is not "permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens," a State may "act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way." *Maryland* v. *Louisiana*, 451 U.S. at 737. The interests of a State that may be vindicated in an original action against another State "embrace its '*quasi-sovereign*' interests which are 'independent of and behind the titles of its citizens, in all the earth and air within its domain.'" *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387, 393 (1938) (quoting *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). And, as the Court held in *Texas* v. *New*

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[3] In *South Dakota* v. *North Carolina*, 192 U.S. 286 (1904), by contrast, a private bond holder donated his bonds outright to the State of South Dakota. The Court observed that there could be no "question respecting the title of South Dakota to these bonds," since "[t]hey [we]re not held by the State as representative of individual owners, * * * for they were given outright and absolutely to the State." *Id.* at 310 (citing and distinguishing *New Hampshire* v. *Louisiana*, *supra*). The Court concluded on that basis that the suit was properly regarded as "an action brought by one State against another to enforce a property right" and was therefore permitted to go forward. *Id.* at 318; see *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387, 392-393 (1938) (discussing *New Hampshire* and *South Dakota*).

Mexico, the Court may properly award money damages as a remedy for injury to those interests. See 482 U.S. at 130, 132 n.7.

The Court, in accepting this case as a proper exercise of its original jurisdiction, determined that Kansas had appropriately commenced the current action to protect its sovereign and quasi-sovereign interests under the Arkansas River Compact, and was not acting simply as a trustee for individual Kansas citizens. Indeed, in *Oklahoma ex rel. Johnson* v. *Cook*, *supra*, this Court specifically pointed to Kansas's prior suit against Colorado to prevent diversions of water from the Arkansas River as an example of a proper suit to protect a State's "*quasi-sovereign*" interests. See 304 U.S. at 393-394 (citing *Kansas* v. *Colorado*, 206 U.S. at 95, 96.). And in this case, unlike in its earlier suit against Colorado, Kansas's suit also advances its sovereign interests as a formal party to an interstate compact with Colorado. See *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 601.

The Master concluded, and Colorado does not dispute, that Kansas is seeking recovery for injuries to its legitimate quasi-sovereign interest in the general economic well-being and property of its citizens, interests which are "independent of and behind the titles of its citizens." *Georgia* v. *Tennessee Copper Co.*, 206 U.S. at 237. Accordingly, Colorado's Eleventh Amendment challenge does not question whether Kansas is properly acting as *parens patriae* in bringing this suit; rather, Colorado asserts that the Eleventh Amendment bars a State properly acting as *parens patriae* from being awarded damages that are based, in part, on the aggregate losses suffered by the State's residents. The applicability of the Eleventh Amendment, however, depends on the nature and origin of the

claim, and not on the measure of damages in an otherwise proper monetary award. If the Court determines that a complaint presents a proper action by a State to protect its sovereign and quasi-sovereign interest in the general health and welfare of its residents, the calculation of the amount of money damages to be paid as a remedy for the injury to the general population of the State cannot convert a proper action between two States into an impermissible action by citizens of one State against another State in violation of the Eleventh Amendment.

The Master found that a large area of southwestern Kansas (almost 800,000 acres) suffered from Colorado's violations of the Compact, that the groundwater resources of Kansas have been permanently damaged, and that increased costs and lost farm income in the region have caused secondary economic impacts throughout the State. Third Report 12. The Master, defining the injuries to the general economic well-being of Kansas's residents as including the regional increases in farm costs and reduced crop yields, recommended a damages remedy consisting of the sum of 1) the additional pumping costs required to replace depletions of usable stateline flow from the Arkansas River; 2) the historic and projected future cost increases due to the permanent damage to groundwater resources; 3) the historic crop production losses due to surface water depletions; 4) the historic and projected future secondary economic damages to the State as a whole; and 5) the state income taxes that would have been paid on increased farm income absent depletions. *Id.* at 17-86. The recommended damages award was reduced by the amount of federal income taxes that would have been paid on the lost farm net income due to depletions. *Id.* at 35-36.

Colorado argues that the inclusion of the aggregate of individual damages in the recommended monetary award allows the State to "recover damages for the benefit of individuals" in violation of the Eleventh Amendment. Colo. Excp. Br. 19. Colorado misconstrues the Master's reference to injuries sustained by farmers in calculating the recommended monetary award to Kansas. The Master did not recommend that a money damages award include a recovery for any personal claims individual farmers may have in their own right based on upstream diversions of water, with the proceeds to be paid directly to those farmers. If Kansas were appearing only as a nominal party in presenting such private claims, those claims would be essentially the same as those the Court found to be barred in *North Dakota* v. *Minnesota*, *supra*.

Rather, Kansas is advancing a claim of its own, in its sovereign and quasi-sovereign capacities, that is based on Colorado's alleged violation of the Compact and is distinct from any personal claims of individual Kansas citizens. After this Court held that Colorado had violated the Compact, the Master determined that damages should be paid to Kansas based on the injury to Kansas's quasi-sovereign interest in the economic health and welfare of its residents. The Master calculated those damages as the sum of the damages for injuries to Kansas's residents, including the direct injuries suffered by water users—past, present, and future—in the southwestern region of Kansas as a result of Colorado's violation.

The Eleventh Amendment does not bar a State from recovering full compensation for injuries to its quasi-sovereign interest in the economic health and welfare of its residents. In this case, the Master calculated those injuries to Kansas, in part, by aggregating the direct

injuries suffered by past, present, and future water users in the State. The Master's recommended award is consistent with the Court's broad discretion in formulating a fair and equitable remedy in cases under the Court's original jurisdiction and does not violate the Eleventh Amendment. See *Texas* v. *New Mexico*, 482 U.S. at 130 (the Constitution entrusts the Court with sufficient judicial power to "order[] a suitable remedy, whether in water or money," and "the Eleventh Amendment is no barrier, for by its terms, it applies only to suits by citizens against a State"). Colorado's exception to the Master's Third Report based on the Eleventh Amendment should be overruled.[4]

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[4] There is no requirement in the Master's remedy here, just as there was not in *Texas* v. *New Mexico* (see 482 U.S. at 131-132 & n.7), that any money awarded to Kansas be paid over to individual farmers who were injured by upstream diversions in Colorado.

The United States and its agencies and officers are authorized to bring suits for violations of federal statutes under which private individuals are also authorized to sue, and the relief ordered in the government's suit includes the payment of monetary relief to individual victims. In such a suit, the federal government is advancing its interests, distinct from those of the individuals who may have personal claims, in enforcing its own laws. See, *e.g.*, *General Tel. Co.* v. *EEOC*, 446 U.S. 318, 326 (1980) ("When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination."). The Court made clear in *Alden* v. *Maine*, 527 U.S. 706 (1999), that the Eleventh Amendment is no bar to such a suit by the federal government against a State. See *id.* at 759 (discussing 29 U.S.C. 216(c), which allows suits by the Secretary of Labor to compel the payment of unpaid compensation owed under the Fair Labor Standards Act). See 527 U.S. at 755 ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government."); *West Virginia* v. *United States*, 479 U.S. 305, 311 (1987) ("States have no sovereign immunity as against the Federal Government.").

II. IT IS WITHIN THE COURT'S SOUND DISCRETION TO AWARD PREJUDGMENT INTEREST IN AN ORIGINAL ACTION

In his Third Report, the Master determined that Kansas was injured as a result of Colorado's depletion of an aggregate of 428,005 acre-feet of usable stateline flows over the years from 1950 to 1996. Third Report 1, 8-9, 12, 120. The Master recommended an award of money damages to Kansas to compensate for those injuries. The Master further recommended that prejudgment interest be granted on the damages from 1969 to the time of judgment. The Master determined, however, that, because from 1950 to 1968 neither Kansas nor Colorado was aware that material depletions of the Arkansas River's usable stateline flows were occurring, the damages for that period should be adjusted for inflation but should not include an interest rate adjustment for the lost time value of money.

Kansas has filed an exception to the Master's denial of prejudgment interest for the period from 1950 to 1968. Colorado has filed an exception to the award of any prejudgment interest. Colorado asserts that due to the complexity of determining depletions to usable stateline flows and the fact that there is no time limitation on actions for violation of an interstate compact, the Court should apply the common law rule, which generally barred an award of prejudgment interest on unliquidated claims, absent bad faith or other exceptional circumstance. Colo. Excp. Br. 28. In the alternative, Colorado contends that if prejudgment interest is awarded, interest should begin to run only

from 1985, when Kansas first made a formal complaint.[5] *Id.* at 37.

The Court has never directly addressed the issue of prejudgment interest in the context of interstate original actions. The United States' liability for interest in original actions, like its liability in other cases, is governed by the usual principles respecting federal sovereign immunity.[6] The liability of the individual States, however, remains an open question.

Prejudgment interest is intended to compensate injured parties for both the time value of lost money and the effects of inflation. "[P]rejudgment interest is not awarded as a penalty; it is merely an element of just compensation." *City of Milwaukee* v. *Cement Division, National Gypsum Co.*, 515 U.S. 189, 197 (1995). Nonetheless, under the traditional common law approach, "prejudgment interest could not be awarded where damages were unliquidated, absent bad faith or other exceptional circumstances." See, *e.g.*, *General Motors Corp.* v. *Devex Corp.*, 461 U.S. 648, 653 (1983); see *Duplate Corp.* v. *Triplex Safety Glass Co.*, 298 U.S. 448 (1936); *Tilghman* v. *Proctor*, 125 U.S. 136 (1888). We do not believe, however, that the common law approach supports Colorado's contention that this Court should

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[5] The Master noted that Colorado agreed that a "fair and equitable remedy" would adjust all damages for inflation. Third Report 107. Colorado appears to be challenging only the award of an adjustment to the damages for the lost time value of money.

[6] This Court has held that "in the absence of constitutional requirements, interest can be recovered against the United States only if express consent to such a recovery has been given by Congress." *United States* v. *New York Rayon Importing Co.*, 329 U.S. 654, 658-659 (1947). See also *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).

adopt a categorical rule prohibiting prejudgment interest in original actions between States.

In the first place, the common law rule itself was not absolute; prejudgment interest was allowed in instances of "bad faith or other exceptional circumstances." *General Motors*, 461 U.S. at 653. Moreover, courts have not always felt bound to follow even that formulation. In fact, it appears that a majority of jurisdictions have now rejected the traditional, restrictive approach to awarding prejudgment interest. See Third Report 94; *id.* App. Exh. 4. This Court, too, has repeatedly noted that the distinction between liquidated and unliquidated damages for these purposes is questionable, and that the rule against prejudgment interest is inconsistent with the goal of full compensation. Indeed, more than 65 years ago, in *Funkhouser* v. *J.B. Preston Co.*, 290 U.S. 163 (1933), the Court stated:

> It has been recognized that a distinction, in this respect, simply as between cases of liquidated and unliquidated damages, is not a sound one. Whether the case is of the one class or the other, the injured party has suffered a loss which may be regarded as not fully compensated if he is confined to the amount found to be recoverable as of the time of breach and nothing is added for the delay in obtaining the award of damages. Because of this fact, the rule with respect to unliquidated claims has been in evolution, * * * and in the absence of legislation the courts have dealt with the question of allowing interest according to their conception of the demands of justice and practicality.

Id. at 168-169. See *City of Milwaukee*, 515 U.S. at 197 ("[T]he liquidated/unliquidated distinction has faced

trenchant criticism for a number of years."); *General Motors Corp.*, 461 U.S. at 655-656.

In admiralty, where this Court has traditionally felt free to fashion rules suited to the particular exigencies in that area, the common law rule has not governed. Instead, in suits in admiralty, prejudgment interest historically has been recoverable except in "peculiar" or "exceptional" circumstances. See *City of Milwaukee*, 515 U.S. at 195 (collecting cases).[7] We think the Court similarly should not import the common law rule into the jurisprudence of suits between States, especially given the criticism of that rule in other settings. This Court has broad discretion in cases within its original jurisdiction and is not bound by statutory or common law rules developed in other contexts. For example, in *Texas* v. *New Mexico*, the Court rejected New Mexico's contention that it was precluded from awarding post-judgment interest in the absence of any statute authorizing such interest. 482 U.S. at 133 n.8. New Mexico had relied in part on the Court's opinion in *Pierce* v. *United States*, 255 U.S. 398, 406 (1921), which, after noting the common law rule that judgments do not bear interest, held that post-judgment interest may not be awarded in the absence of statutory authority. Emphasizing its broad discretion in original jurisdiction cases, the Court declared that "we are not bound by this rule in exercising our original jurisdiction." 482 U.S. at 133 n.8. What was true of the common law rule respecting *post*-judgment interest in *Texas* v. *New*

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[7] We note as well the general rule that prejudgment interest is due on debts owed to the federal government, including debts owed by state and local governments. See, *e.g.*, *United States* v. *Texas*, 507 U.S. 529, 533-534 (1993); *Board of County Comm'rs* v. *United States*, 308 U.S. 343, 350-353 (1939).

Mexico is true of the common law rule respecting *pre*-judgment interest here.

Based on his review of the applicable law, the Master concluded that the unliquidated nature of Kansas's money damages should not, in and of itself, bar an award of prejudgment interest. Third Report App. 43. We agree. Because prejudgment interest is awarded not as a penalty, but as an element of compensation, application of the traditional common law rule could result in substantial unfairness to a State that was unquestionably injured by a violation of an interstate compact, if the amount of the damages was not readily ascertainable prior to judgment. A strict rule against the award of prejudgment interest in such cases could also result in an unjustified windfall for the offending State and undermine a potentially important incentive for States to comply with the requirements of an interstate compact.

After rejecting Colorado's argument for a categorical rule barring an award of prejudgment interest, the Master proceeded to determine if "considerations of fairness," *Board of County Comm'rs* v. *United States*, 308 U.S. at 352, suggested that the Court should exercise its discretion to award prejudgment interest under the circumstances of this case. Following a careful analysis of all of the equities regarding an award of prejudgment interest, the Master was convinced that "prejudgment interest adjusting for inflation and for the loss of use of funds owed should be included in any damage award for violation of an interstate water compact." Third Report 102.

The Master concluded, however, that an award of prejudgment interest for the entire period of the violation in this case would not be fair and just. He relied principally on the lack of knowledge by both parties in

the early years about pumping in Colorado and its impacts along the Arkansas River, as well as the difficulty of determining the impact of groundwater pumping on usable stateline flows. Third Report 106 ("Neither state in the early years saw any wrongdoing, or thought that Kansas was not receiving its compact share of usable flows of the Arkansas River."); *ibid.* (Depletions during this period were discovered only "with hindsight and the benefit of sophisticated computer modeling."). Based on his finding that by 1968 Colorado knew, or should have known, that post-compact wells were causing material depletions of usable stateline flows, the Master recommended that Kansas be awarded actual damages for the period from 1950 to 1968, adjusted for inflation only. For the period from 1969 to the date of judgment, the Master recommended that Kansas be awarded prejudgment interest. *Id.* at 103, 106.

The Master's recommendation concerning an award of prejudgment interest is based on a thorough evaluation of the relevant considerations of fairness and justice. The nature of this Court's original jurisdiction and its broad discretion in formulating fair and equitable remedies in such cases, see *Texas* v. *New Mexico*, 482 U.S. at 130, permits the Court to fashion an appropriate remedy, including an award of prejudgment interest. The United States believes that the Master has provided a sound basis for an award of prejudgment interest that reasonably balances the equities of each State.

CONCLUSION

The exceptions of Colorado and Kansas to the award of prejudgment interest and the exception of Colorado to the calculation of the amount of damages due based on the Eleventh Amendment should be overruled.

Respectfully submitted.

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